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AUG 4 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 72-204

B. G. SOLOMON,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Supreme Court of the United States

No. .....

B. G. SOLOMON,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, B. G. Solomon hereby petitions for a Writ of Certiorari to review the decision of the Virginia Supreme Court made on May 11, 1972 which affirmed the decision of the Trial Court.

OPINIONS BELOW

The opinion of the Virginia Supreme Court decided on May 11, 1972 is appended hereto in the appendix.

The opinions of the Trial Court sustaining Seaboard's motion to strike the petitioner's evidence and enter summary judgment for the Seaboard is appended hereto in the

appendix. Neither the opinion of the Virginia Supreme Court nor the opinion of the Law and Equity Court of the City of Richmond will be officially reported.

JURISDICTION

The order sought to be reviewed was made and entered on May 11, 1972. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The Statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Was there sufficient evidence to make a jury issue under the Federal Employers' Liability Act as to whether the Seaboard was negligent or failed to furnish the petitioner with a safe place to work and that such negligence or failure to provide a safe place to work contributed in whole or in part to petitioner's injuries?

2. Does the decision of the Court below infringe upon and restrict the right of a railroad employee to have a jury determine issues of negligence and causation according to the provisions of the Federal Employers' Liability Act and the cases decided by this Court?

STATUTE INVOLVED

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories. . . shall be liable in damages to any person suffering injury while he is employed by such

carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." (See 45 U.S.C.A. Section 51, Federal Employers' Liability Act, page 150)

STATEMENT OF THE CASE

The petitioner, an employee of the Seaboard, filed a motion for judgment under the Federal Employers' Liability Act against the Seaboard for serious and permanent injuries alleging that the Seaboard was negligent in requiring him to perform duties not within his job as a hostler and/or failing to furnish him a safe place to work. The matter was tried before a jury and after the presentation of the petitioner's evidence, the Trial Court sustained Seaboard's motion to strike the evidence and entered final judgment for the Seaboard (App. 6).[1] The petitioner then appealed to the Virginia Supreme Court alleging in its assignment of error that the Court erred in striking his evidence (App. 7). The Virginia Supreme Court did not find any reversible error and affirmed the decision of the Trial Court (App. 9).

Solomon was employed with the Seaboard as a hostler on September 9, 1967 and worked in and near Hamlet, North Carolina. On this date, Solomon reported to work at the Seaboard's Passenger Station in Hamlet at 2:00 a.m. (T-31), and was due to get off at 10:00 a.m. (T-32). A hostler's duties included adding and taking off Seaboard

[1] Reference will be made in the following manner: App. means appendix in petition for certiorari; T- means printed transcript.

engines that came into the passenger shop, watering and refueling engines, and transporting engines between the passenger shop in Hamlet and the Seaboard's diesel shop three to four miles north of Hamlet (T-24) where the engines were serviced and maintained. On September 9, 1967 Solomon spent the good part of his work shift fueling and watering engines that came into the passenger station (T-31). Solomon was then ordered to take three engines from the passenger shop to the diesel shop (T-32). Solomon arrived at the diesel shop at 9:30 a.m. (T-33).

Upon his arrival at the diesel shop, Solomon was ordered by a Seaboard supervisor to take a truck and drive himself and his helper back to the passenger station where he was to quit working (T-54). According to Solomon, it was not part of his duties to operate a truck, as a hostler was not customarily required to operate a truck (T-27, 29). Hostlers were governed by the same rules as enginemen, firemen, and trainmen, which rules did not require the operation of motor vehicles (T-31). If Solomon was at the passenger shop and the Seaboard needed him at the diesel shop, they would have sent someone down to the diesel shop to pick him up (T-25). Most of the time Solomon traveled between the passenger shop and diesel shop by rail (T-25, 26). If Solomon was not traveling by rail, the Seaboard would get a laborer to drive him back to the passenger station (T-33, 34). Solomon's helper never drove a truck and he never rode in a truck driven by his helper (T-26).

In accordance with the orders of the Seaboard, Solomon drove a Seaboard truck back to the passenger station on N. C. Route 177 (T-49). Route 177 was a two-lane, eighteenfeet wide road with a posted speed limit of 55 m.p.h. (T-49). It was raining and the roads were slick (T-48). As Solomon approached a curve, he saw an oncoming car

in trouble coming toward his path (T-47). Solomon was going approximately 45 m.p.h. and immediately braked the truck down and pulled off the highway (T-48). The first car slid by Solomon, and Solomon had already applied his brakes hard when a second vehicle slammed into him while he was going 30 to 35 miles an hour (T-49). Solomon did not stop as he thought he should have (T-49, 51). Solomon began braking about 300 feet away and began braking hard one hundred fifty feet away (T-51).

Several expert witnesses were also called by Solomon. Hughes, an engineer who had worked for the Richmond, Fredericksburg and Potomac Railroad for 31 years, was familiar with hostling work (T-68). Hughes indicated that on the Richmond, Fredericksburg and Potomac, the railroad would move a hostler from one location to another by locomotive (T-71), and in the event there was not a locomotive, the railroad furnished transportation and the man would not be required to operate the vehicle (T-71, 73).

Larry Oakley, an employee of the Norfolk and Western for sixteen years as a fireman and engineer, was also familiar with hostling and the duties of a hostler (T-75). The duties of a hostler did not require him to operate motor vehicles (T-75). In the event the hostler was not transported by rail, the railroad would send a car with a qualified driver (T-76).

Solomon sustained serious injuries requiring hospitalization for 28 days and lost $6,500.00 in wages (T-8, 10). The lower five teeth in Solomon's jaw were dead as a result of the accident and required extensive root canal therapy at the University of North Carolina (T-4 de bene esse deposition of Dr. Cathey) and permanent damage was done by the loss of nerves (T-6 de bene esse deposition of Dr. Cathey). X-rays and examination showed five upper teeth

were lost along with substantial bone loss (T-8 de bene esse deposition of Dr. Sowter). Medical evidence also revealed marked lacerations of the face and scalp (T-6 de bene esse deposition of Dr. Green) a fracture of the right mid humerus (T-6 de bene esse deposition of Dr. Green) a fracture of upper end of tibia (T-8 of de bene esse deposition), fractured ribs (T-8 of de bene esse deposition), and a fractured left patella tendon (T-14 of de bene esse deposition).

The Trial Court refused to allow opinion evidence of Solomon's expert that travel by rail is safer than travel on the highway (T-102), or the testimony of Solomon that it took ten to thirty minutes to get an available person to drive the vehicle (T-44).

REASONS FOR GRANTING THE WRIT

This Court has zealously protected the right of a railroad employee to have a jury pass on issues of negligence and causation under the Federal Employers' Liability Act.

> "In passing upon whether there is sufficient evidence to submit an issue to the jury, we need only to look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremtory instruction has been given." See *Webb* v. *Illinois Central Railroad Company*, 352 U.S. 512, 77 S.Ct. 451, 1 L. Ed. 2d 503 (1957).

It has long been held that the sufficiency of the evidence in an action in a state court under the Federal Employers' Liability Act to support a finding of a right to recover is a federal question reviewable by the Supreme Court of the United States. See *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L. Ed. 239 (1943).

In reviewing, the sufficiency of the evidence of a Federal Employers' Liability case in a state court, this Court in the landmark case of *Rogers* v. *Missouri-Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493 (1956).

> *"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that empolyer negligence played any part, even the slightest,* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. *Judicial appraisal of the proofs to determine whether a jury case is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights to make that appraisal and, if that test is met, are bound to find that a case for the jury is made whether or not the evidence allowed the jury a choice of other probabilities.* The Statute expressly imposes liability on the employer to pay damages for injury or death 'in whole or in part' due to its negligence." See *Rogers, supra,* at 506, 507. (Italics ours.)

> "Special and important reasons for the granting of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination." See *Rogers, supra,* at 510.

A suit under the Federal Employers' Liability Act significantly differs from common law negligence in terms of the standard of proof and that it was the intent of Congress to secure railroad employees a jury trial in a larger portion of cases than would be true in ordinary negligence actions. A jury trial is a part of the remedy. See *Atlantic and Gulf*

Stevedores v. *Ellerman Lines*, 369 U.S. 355, 360, 82 S.Ct. 780, 7 L. Ed. 2d 798 (1962). See also *Tennant* v. *Peoria and P. U. R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L. Ed. 520 (1944).

Solomon did not have to prove common law causation but only that his injury resulted in whole or in part from the Seaboard's negligence. See *Crane* v. *Cedar Rapids and Iowa City Railway*, 395 U.S. 164, 166, 89 S.Ct. 1706, 23 L. Ed. 2d 176 (1969).

Here there was sufficient evidence to make a jury issue as to the Seaboard's negligence which in whole or in part caused Solomon's injuries. The record undisputedly indicated that it was not Solomon's duty to drive a Seaboard truck, that it was the Seaboard who ordered him to drive the truck because of the unavailability of laborers or personnel and that as a result Solomon sustained serious and permanent injuries. Evidence also indicated that the roads were slick because of the rain which the Seaboard knew or should have known of and that the brakes on the truck only slowed the truck down to 30 to 35 miles per hour from 45 miles per hour, although the brakes had been applied hard over 150 feet.

In *Davis* v. *Virginian R. Co.*, 361 U.S. 354, 80 S.Ct. 387, 4 L. Ed. 2d 366 (1960) the plaintiff was a railroad conductor who alleged that the railroad was negligent in requiring the shifting of cars at a fast rate with inexperienced help. There the conductor slipped on a ladder while descending from a car. No evidence was admitted to show that the ladder was negligently maintained or that there was any foreign substance on the ladder. The lower court struck the plaintiff's evidence and this action was approved by the Virginia Supreme Court. This Court then held that there was evidence for the jury to pass on and remarked

that the conductor would have been working on the ground rather than on the railroad cars, but for the inexperience of the brakeman, and that the conductor was required to engage in a function not ordinarily performed by the conductor.

CONCLUSION

Petitioner submits there was sufficient evidence to make a jury issue as to whether the Seaboard was negligent or failed to provide a safe place to work which in whole or in part caused Solomon to suffer serious and permanent injuries. This Court in the past has granted certiorari to insure that the intent and language of the Federal Employers' Liability Act is uniformly applied by the state courts of this country. This Court should grant certiorari to protect a railroad employee's right to a jury trial which is a part of the remedy under the Federal Employers' Liability Act.

Respectfully submitted,

RAYMOND H. STROPLE
Of Counsel

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Counsel for Petitioner

CERTIFICATE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of *B. G. Solomon* v. *Seaboard Coast Line Railroad Company* were deposited in the United States mails, first class, prepaid to Eppa Hunton, IV and Joseph M. Spivey, counsel of record for the respondent, Seaboard Coast Line Railroad Company, at their office of Hunton, Williams, Gay and Gibson at 700 East Main Street, Richmond, Virginia, on the 3rd day of August, 1972. It is further stated that the Petition has been served on all parties.

RAYMOND H. STROPLE

APPENDIX

Virginia:

In The Law And Equity Court Of The
City Of Richmond

B. G. Solomon,

Plaintiff,[1]

v.

Seaboard Coastline Railroad Company,

Defendant.

Date: November 5, 1971

Before: The Honorable Robert L. Young Judge and Jury

MOTIONS AND ORAL OPINION OF TRIAL COURT

IN CHAMBERS

Mr. Spivey: Your Honor, at this time, on behalf of the defendant, I would move the Court to strike out the plaintiff's evidence and enter up summary judgment for the defendant on the grounds that there is not the slightest showing in this case that there is any evidence of negligence on behalf of the plaintiff against the Seaboard.

The elements of their case seem to be that we have failed to furnish them with a safe place to work, but there is no evidence that it was not a safe place to work.

Now, we have admitted that he was in the course of his employment, and I think it is true that he was in the course

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[1] The Law and Equity Court of the City of Richmond does not assign docket or case numbers to cases filed in that Court.

of employment until he got to where he was going to stop work that day. Even if he had been furnished a chauffeur, as they claim he should have been, there is no showing that the chauffeur wouldn't have been involved in that accident.

The Court: I showed my age by referring to Barney Oldfield, didn't I?

(Laughter.)

Mr. Spivey: In any event, Judge, with respect to the furnishing of the chauffeur and the operation of the truck, I suppose I agree with the Court's observation that Barney Oldfield himself couldn't have avoided the accident. The only point that they make is if he would have been furnished a chauffeur, he would not have been at that point at that time. Well, that is not necessarily so.

The Court: Well, I have overruled that.

Mr. Spivey: There is no showing that Seaboard had any control over this highway. Even stretching it out to the limits, there is no showing that the other driver of the truck that hit the man was a Seaboard employee.

This is a very strange and curious case, Judge, and for the life of me—

The Court: Well, it is like all these cases. It is a heart-rending case. This isn't a guy coming in and saying he has this misery when he wasn't even touched. This man was hurt.

Mr. Spivey: We admitted that in the opening statement, Judge. I think it is somewhat less heart-rending when it is realized that his hospital and doctor bills have been paid for.

And it looks to me like he has a mighty fine cause of action against the fellow that slid over and hit him.

Mr. Strople: But you have intervened in that case in North Carolina, claiming to get your hospital bills back.

The Court: I didn't think you all did that. I have known guys at the C & O out at Clifton Forge, and they never asked for their hospital bills back. I am not an arbiter of that.

Mr. Hunton: There are two suits pending in North Carolina.

Mr. Spivey: The man will come out whole in this thing, Judge. But that is not really the point here.

The Court: I am no authority on all FELA cases. I have read the cases that you are talking about.

I remember reading about the bite case when it first came out in the United States Supreme Court reports, and I read them from time to time. And I used to hear them argued down in Federal Court, but it has been twenty years since I stopped going in the Federal Courts.

But I just don't see anything to this case, gentlemen, except here is a man routinely, that if they don't have another engine to bring him back or some other railroad conveyance, he goes by truck. They go by company truck. That was all part and parcel of his work.

Sometimes he drove; sometimes other people drove. More often it was others. But it wouldn't have made a particle of difference who was driving.

Assume that I am right. I have ruled on the evidence on those two points, and I am satisfied that I have ruled right. Now, do you have anything left, gentlemen?

Mr. Strople: Yes, sir, I think we have a couple of points. First of all, Mr. Solomon testified that the highway was wet and slippery, and the testimony has been that it had been raining for some time and was at the time.

Now, the only evidence as to the other cars was that they were sliding. There was no evidence of any speed. I admit that there is evidence that they were on the wrong side of the road, but at this point of time—

The Court: No. He said it was fishtailing. There was testimony that the first car was fishtailing and that the second car came around in such a manner that they engaged side to side. So he had to be crosswise of the road.

Mr. Spivey: That was in Mr. Moody's opening statement, Judge.

The Court: I mean I am just trying to recall the evidence.

Mr. Strople: I think he said that they were behind each other and the first one started fishtailing, and he got off the road, and the next thing he saw, the second one was sliding, and he missed the first one. And he admitted the car was sliding on the wrong side of the road. The impact was on the wrong side of the road.

But at this point in time, I think the railroad's answer is that Johnny Ray Dawkins was the proximate cause of this accident, and there has been no evidence of that except that he was sliding and ran into the plaintiff.

And, another point, Judge, about the control. I don't think there is any allegation under the law that we have to show that the railroad had any control over this highway. It is just like the premise of any third party as in the *Schenker* case.

An I have got a lot of cases here, Judge just holding that as a matter of law the railroad is responsible to provide any railroad employee a safe place to work, whether it is on the premises or anywhere else.

The other part of this, Judge, at this point, Mr. Solomon

did indicate that when he saw this thing he got off, and he started braking, and he didn't think his truck stopped as fast as it should have. And there was evidence there where the impact was and how the impact was. And I would think from that he has raised an issue as to how the brakes worked. He did say it was a good working truck and a good running truck, but he said the brakes just didn't catch like they should have.

The Court: He didn't go quite that far. He said he didn't get all the way stopped, and so forth, but I assume that it was because he was on wet pavement and then on a wet shoulder. I mean he didn't give any statement from which you could infer defective brakes.

Mr. Strople: Well, he said that he was doing forty-five, and he said he was going thirty or thirty-five at the time of the impact. He testified as to distance. The Seaboard has put in no evidence in there that there were any skid marks at the scene on the road or on the dirt. These are some of the other points that we are talking about, Judge. I know you have ruled on some of these.

I don't want to belabor you on it, but the FELA was passed by Congress, and the concept is that any prohibitive facts which any jury can make any inference from are a question from the jury, and that is the law. It is entirely different from the common law, and I think that we have—

The Court: Well, it is supposed to be in the common law, except they make a very, very liberal interpretation of it, I will admit that.

Mr. Strople: I just think at this time, Judge, that under the law of the FELA we have made a jury case at this time. They haven't put on any evidence, and they haven't shown an intervening cause as a matter of law at this time, I don't believe, Judge.

The Court: Well, is there anything you want to say, sir?

Mr. Moody: Judge, I think that Mr. Strople has pretty well covered the law. Of course, there are several factors that were mentioned by him that are in this case which we feel is sufficient for the matter to be considered by the jury, Your Honor, in this case on the safe place to work theory.

They put him there and it was according to our evidence that it involves the question of safety. It was not a safe place. We feel the jury certainly could conclude that. And we think it is a jury question at this point.

I admit that the gentleman from the Norfolk and Western Railroad said that they also at times would use motor vehicles, but they usually used the engines. And they would transport them back to their point where they came from by an engine. So I think that we do have sufficient evidence here to submit the case to the jury.

The Court: Motion sustained.

Mr. Strople: Note our exception, please.

IN OPEN COURT

The Court: Gentlemen, I don't know whether you have met with this type of situation before in your services, but in those cases based upon negligence there is a preliminary question for the Judge to say whether or not any issue has been raised for the jury to pass upon. In this case I have ruled that there is not, and so I will just discharge you from further consideration and bring up a final judgment for the defendant.

Court Adjourned at 2:55 o'clock P.M., November 5, 1971.

Virginia:

In The Court Of Law And Equity For The
City of Richmond

B. G. Solomon,

Appellant,

v.

Seaboard Coast Line Railroad Company,

Appellee.

NOTICE OF APPEAL
AND
ASSIGNMENTS OF ERROR

To: Luther Libby, Clerk
Court of Law and Equity
Richmond, Virginia

The Appellant, B. G. Solomon, pursuant to Rule 5:1 § 4 of the Rules of Court, hereby gives notice that he will petition the Supreme Court of Appeals of Virginia for a writ of error to a final judgment rendered on the 5th day of November, 1971, and the said appellant states the following assignments of error which he will rely on in said appeal.

ASSIGNMENTS OF ERROR

1. The Court erred in striking the plaintiff's evidence and entering summary judgment for the defendant, as there was sufficient evidence to make a jury issue under the Federal Employers' Liability Act as to whether the railroad was negligent or failed to furnish the plaintiff with a safe place to work and that such negligence or failure to provide a

safe place to work contributed in whole or in part to plaintiff's injuries.

2. The judgment of the Court is contrary to the law and the evidence.

3. The Court committed prejudical error in not allowing the testimony of B. G. Solomon as to how long it would take the Seaboard to get a driver for the truck to carry Solomon back to the passenger station and how long it took Solomon to get the truck in question which prejudiced Solomon.

4. The Court committed prejudicial error in not allowing the expert testimony of Dr. Hall that transportation by rail is a safer mode of transportation than transportation on the highway system.

B. G. Solomon"

By: Raymond H. Strople

Willard J. Moody, Esquire
Raymond H. Strople, Esquire
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200 Professional Building
Portsmouth, Virginia 23704

I certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to Eppa Hunton, IV, Esq., Hunton, Williams, Gay, Powell and Gibson, 700 East Main Street, Richmond, Virginia, counsel for the Seaboard on the .... day of December, 1971.

.....

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 11th *day of* May, 1972.

Virginia:

In The Law And Equity Court Of The
City of Richmond

B. G. Solomon,[2]

Plaintiff,

v.

Seaboard Coastline Railroad Company,

Defendant.

The petition of B. G. Solomon for a writ of error to a judgment rendered by the Law and Equity Court of the City of Richmond on the 5th day of November, 1971, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Seaboard Coast Line Railroad Company was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Law and Equity Court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

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[2] The Supreme Court of Virginia does not assign case numbers until after an appeal has been granted.

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Supreme Court of the United States

No. .....

B. G. SOLOMON,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT[1]

This is a negligence case under the Federal Employers' Liability Act (FELA).[2] It presents no legal questions not previously resolved, nor is there any dispute over the principles to be applied. The only question is the application of established principles and clearly defined rules to the facts of this case.

[1] Appellant, B. G. Solomon, will be referred to throughout as "appellant." Respondent, Seaboard Coast Line Railroad Company, will be referred to throughout as "Seaboard."

All emphasis has been added unless otherwise noted and references to the transcript will be indicated by the letter "T," followed by the appropriate page numbers.

[2] 45 U.S.C. § 51, et seq. (1964).

Reduced to its essentials, appellant's Petition for Certiorari is based on two contentions[3]: First, appellant contends that Seaboard's furnishing of motor vehicle transportation rather than rail transportation constitutes negligence under FELA inasmuch as rail transportation may be statistically safer. Secondly, appellant contends that Seaboard's failure to furnish a driver constitutes negligence under FELA inasmuch as it sometimes took Seaboard a few minutes to furnish a driver and had it done so in this case, appellant would not have been at the point of impact at the precise time of impact.

Manifestly, both contentions are wholly without merit. To adopt either would effectively eliminate any fault requirement from FELA and make railroads the insurers of their employees, a result not contemplated by Congress in passing the Act nor by the Supreme Court in construing it.

II.

QUESTIONS PRESENTED

1. Can it be said that the failure to furnish a driver constitutes negligence under the FELA even though it is clear that appellant was an experienced, competent driver, thoroughly familiar with the type of vehicle involved and it is undisputed that there was nothing appellant or any other driver could have done to prevent the accident as the collision was entirely the fault of the driver of the other vehicle?

2. Can it be said that the failure to furnish a driver is the legal cause, in whole or in part, of appellant's injuries simply because it usually took a few minutes to provide a driver and, had one been supplied in this case, it is speculated that appellant might not have

[3] These contentions are stated by appellant's counsel at T. 41, 88-89.

been at the point of impact at the precise time of impact?

3. Does the railroad custom of transporting hostlers by motor vehicle when rail transportation is unavailable constitute negligence under the FELA simply because rail transportation may be statistically safer?

III.

STATEMENT OF FACTS

The facts pertinent to this Petition for Certiorari may be briefly stated. Employed by Seaboard as a "hostler," appellant was chiefly responsible for coupling and uncoupling engines and for transporting engines between Seaboard's passenger station in Hamlet, North Carolina, and its diesel shop, approximately three to four miles north of Hamlet. (T. 23, 24). On September 9, 1967, appellant reported for work at the passenger station in Hamlet. (T. 31). Appellant's final task on that date was to transport three engines from Hamlet to the diesel shop. (T. 32, 33). On completing this task, appellant's supervisor made a Seaboard pickup truck available to appellant and his helper so that they might return to Hamlet.

Appellant's testimony established that it was customary for Seaboard to provide hostlers with either rail or motor vehicle transportation back to Hamlet from the diesel shop. (T. 25).[4] If a hostler delivered an engine to the diesel

[4] On this point, appellant also offered the testimony of both Charles M. Hughes, a locomotive engineer with the Richmond, Fredericksburg & Potomac Railroad and L. Oakley, a locomotive fireman and engineer with the Norfolk & Western Railroad. On cross-examination, both admitted that they had no first-hand knowledge of customs, practices or procedures of the Seaboard. (T. 72, 79). Both also admitted that trains and motor vehicles were both customary modes of transportation for hostlers on their respective railroads. (T. 73, 76).

shop and there was no engine to be returned to Hamlet and no other rail transportation returning to Hamlet at the time, then it was customary for the hostler to return to Hamlet by motor vehicle. (T. 25). By the same token, if an engine needed to be moved from the diesel shop to Hamlet, a hostler would sometimes travel to the diesel shop by motor vehicle. (T. 25).

On many occasions, Seaboard supplied a driver for the motor vehicle. (T. 26). Sometimes, though, hostlers drove the motor vehicles themselves. (T. 26). In this instance, no driver was supplied and appellant drove the vehicle himself. According to appellant's excluded testimony, the result of the failure to furnish a driver was that his departure from the diesel shop was earlier than it would have been had a driver been assigned. (T. 43-46).

The vehicle furnished to appellant by Seaboard was a pickup truck which, according to appellant himself, was in good condition and "drove well." (T. 65). In addition, appellant noted that he was quite familiar with this type of truck as he then owned and drove a pickup truck of this kind. (T. 66).

After departing the diesel shop, appellant, with his helper as a passenger, traveled south on U.S. Route 177 towards Hamlet. (T. 47). As he approached a curve, appellant observed two oncoming vehicles approaching in a dangerous manner. (T. 47, 50). In an effort to avoid a collision, appellant braked and simultaneously drove his vehicle entirely off the roadway onto the right-hand shoulder. (T. 47, 48). Notwithstanding these precautions, one of the vehicles narrowly missed the appellant's truck while the other collided with it at a time when appellant's truck was entirely off the paved portion of the road. (T. 53, 54).

IV.

ARGUMENT

The Court Properly Struck Appellant's Evidence And Entered Judgment For Seaboard As There Was No Evidence Whatsoever Of Any Negligence On The Part Of Seaboard.

The basic rules governing disposition of FELA cases should be clearly stated at the outset. To begin with, cases are legion holding that there is no liability under FELA without fault; railroads are not the insurers of their employees.[5] In *Davis* v. *Virginia Ry.*, 361 U.S. 354 (1960), a case relied on by appellant in his brief, the Court chose to emphasize this point by beginning its opinion with the terse statement:

> "This is a negligence case. . . ." 361 U.S. at 354.

In another recent case, the Fifth Circuit put it this way:

> "Despite some loose talk to the contrary, the plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the *negligence* of the employer railroad, e.g.:
>
> > '* * * for such injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' 45 U.S.C.A. § 51." Simpson v. Texas & N.O. R.R., 297 F.2d 660, 662 (5th Cir. 1962).

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[5] See, e.g., *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138 (1959); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); *Atlantic Coast Line R.R.* v. *Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952 (1951); *Chesapeake & O. Ry.* v. *Burton*, 217 F.2d 471 (4th Cir. 1954); *Missouri Pac. R.R.* v. *Mendoza*, 337 S.W.2d 622 (Tex. Civ. App. 1960), *cert. denied* 365 U.S. 818 (1961); *Mensen* v. *Baltimore & O. R.R.*, 111 Ill. App.2d 362, 250 N.E.2d 303 (1969).

Thus, a party attempting to establish liability under FELA must prove negligence, *i.e.*, that an act or omission on the part of the railroad created an unreasonable risk which was or should have been foreseeable. In addition, there can be no liability if the negligent act or omission is only remotely related to the employee's injuries. While the strict common law requirement of *a single* proximate cause may be inappropriate in FELA cases, the authorities uniformly reflect that the alleged negligence must nevertheless be at least one of the causes proximately related to the injuries.[6]

Finally, it is unquestionably true that *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1956) requires trial courts to be liberal in administering FELA. This does not mean, however, that trial courts should abdicate their responsibility and permit juries to render verdicts in the absence of any proof from which negligence and a proximate causal relation could be inferred.

With the foregoing basic principles before us, we turn now to an examination of the two contentions made by appellant in seeking to overturn the trial court, namely, (1) that Seaboard should not have permitted appellant to drive for if a driver had been furnished, appellant's departure might have been delayed with the possible result that the pickup truck carrying appellant would not have been at the scene of the collision at the instant of impact and (2) that in furnishing motor vehicle transportation,

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[6] See, e.g., *Brady* v. *Southern Ry.*, 320 U.S. 476 (1943), cited on page 6 of appellant's Brief; *Reed* v. *Pennsylvania R.R.*, 171 Ohio St. 433, 171 N.E.2d 718, *cert. denied* 366 U.S. 936 (1961); *Atlantic Coast Line R.R.* v. *Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952 (1951); *Chesapeake & O. Ry.* v. *Burton*, 217 F.2d 471 (4th Cir. 1954); *Nicholson* v. *Erie R.R.*, 253 F.2d 939 (2nd Cir. 1958); *Reynolds* v. *Atlantic Coast Line R.R.*, 196 F.2d 643 (5th Cir. 1952); *Southern Ry* v. *Mais*, 192 Va. 68, 63 S.E.2d 720 (1951).

Seaboard failed to furnish a safe place to work simply because rail might be a statistically safer mode of transportation.

A. Permitting Appellant To Drive Was Not Negligent And Did Not Contribute In Whole Or In Part To Appellant's Injuries.

Appellant's contention that the failure to furnish a driver contributed somehow to his injuries is entirely specious. The fact is that the accident was solely the fault of the driver of the other vehicle and there was nothing appellant or any other driver could have done to prevent it.[7] On this point, the record is unequivocal; appellant was a well-qualified, competent driver with considerable experience in the type of pickup truck involved and, in any event, as the trial judge aptly put it, Barney Oldfield himself could not have avoided the wreck. (T. 89). Thus, the mere fact that appellant was driving is wholly without relevance. By the same token, the frequent suggestions in appellant's brief that it was not appellant's job to drive are also irrelevant.

But appellant's principal contention is not that Seaboard was unreasonable in permitting appellant to drive, but rather that but for the failure to furnish a driver, appellant might have been delayed in departing the diesel shop and, thus the accident would not have occurred as appellant would not have been at the accident site at the instant of impact. From this fallacious reasoning, appellant asks this Court to conclude that the failure to furnish a driver played a role in appellant's injuries.

This is, of course, a preposterous proposition, unworthy of consideration by this Court. Under such "but for" reasoning, the chain of causation would be infinite. Thus, con-

[7] Appellant testified, not surprisingly, that he has brought suit against the other driver in another court. (T. 66).

ceivably appellant himself "caused" the accident as "but for" his failure to remain in bed that day, he would not have been at the collision site at the time of impact.

Not surprisingly, no case cited by appellant supports his contention on this point. Much less surprising is the fact that those cases which have considered bizarre contentions of this nature have given them short shrift. Thus, in *Simpson* v. *Texas N.O. R.R.*, 297 F.2d 660 (5th Cir. 1962) the plaintiff, a railroad messenger, was required to resort to public transportation when his motorcycle broke down. After getting off the bus and while it was raining hard, he was struck by an automobile as he was in the process of crossing the street. Like the appellant in this case, the plaintiff in *Simpson* argued in essence that the railroad should be liable under FELA since but for the faulty motorcycle, plaintiff would not have had the accident. The Fifth Circuit had no difficulty rejecting this contention out of hand:

> "Plaintiff having left the motorcycle and gotten onto a public bus, the chain of causation between breakdown of the motorcycle and any subsequent occurrence was effectively broken, and plaintiff's situation was no different than it would have been if he were normally required to perform his duties on foot and by use of public transportation. Thereafter plaintiff's injuries were caused by an ordinary automobile accident which may have been unavoidable, or may have resulted from the negligence of the automobile driver, the negligence of the plaintiff, or both—but clearly not from the negligence of the defendant railroad. *To hold that defendant should have shielded plaintiff from ordinary traffic hazards is tantamount to making it an insurer.* The Act does not make the railroad company an insurer against personal injuries to its employees." 297 F.2d at 662.

Similarly, in *Nicholson* v. *Erie R.R.*, 253 F.2d 939 (2d Cir. 1958), the plaintiff was injured when a passenger on one of defendant's trains negligently struck her leg with a suitcase. Plaintiff was the only female railroad employee in the area and since there were no toilet facilities there provided for ladies, she was aboard that car for the purpose of using the ladies' room. Her theory of recovery was essentially identical to that advanced by the appellant in this case, namely, that but for the failure of the railroad to furnish toilet facilities for women, she would not have been on the car in which she was injured.

On these facts, the trial court granted the railroad's motion for a directed verdict and the Second Circuit affirmed, offering the following remarks especially pertinent to the case at bar:

> "The causation requisite for recovery under the F.E.L.A. is lacking.
>
> * * *
>
> "Speaking literally it cannot be denied that in the case at bar failure to supply toilet facilities 'played a part' in producing plaintiff's injury. If defendant had supplied indoor toilet facilities plaintiff would not have been where the passenger's baggage struck her. It is not enough, however, that the injury would not have happened 'but for' the negligence. Assume that plaintiff here, because of the delay incident to her long way around via the car's lavatory, took a train that arrived at Bloomfield fifteen minutes later than the one which she would have taken if toilet facilities had been furnished at her place of employment and that she was struck by an automobile in the street in Bloomfield on her way home from the station. She would have escaped injury 'but for' the failure to supply toilet facilities, yet the causation certainly would not even meet the modest requirements of the terms of the F.E.L.A. The fault

would be too far removed both in space and time from the injury." 253 F.2d at 940, 941.

This Court put this point more succinctly in a case relied on by appellant in his brief:

> "Events too remote to require prevision need not be anticipated." *Brady* v. *Southern Ry.*, 320 U.S. 476, 483 (1943).

In summary, the legal principles applicable here are neither novel nor disputed. To recover appellant must establish that Seaboard was negligent and that this negligence was the *legal cause* in whole or in part of his injury. Far from establishing this, allowing appellant to drive was not negligence on the part of Seaboard nor can it plausibly be said to have been the legal cause in whole or in part of appellant's injury. At most, appellant has shown only that, so far as Seaboard was concerned, his accident was an event far too remote to be anticipated.

B. The Trial Court Properly Excluded Statistical Evidence On The Comparative Safety Of Road And Rail.

The contention that the comparative statistical safety of rail over road transportation renders railroads liable under FELA if they fail to furnish rail transportation to their employees is at least as absurd as appellant's first contention. Acceptance of such a proposition would effectively make the railroad an insurer of its employees, a result specifically proscribed by Congress and the Supreme Court.

Here again, it is not at all surprising that none of the cases cited by appellant support his position. Unlike the case at bar, all of the cases cited on this point in appellant's brief involve some act or omission on the part of the railroad reasonably amounting to negligence. Thus, in *Davis* v. *Virginian Ry.*, 361 U.S. 354 (1960), the railroad argu-

ably furnished plaintiff with an unsafe place to work by assigning inexperienced men to assist him and by requiring him to complete a difficult spotting job within 30 minutes.

So absurd is appellant's contention in this regard that it is no wonder that the precise point has not arisen in the reported cases. Analogous authority, however, leaves no doubt as to the unsoundness of appellant's position. Thus, in *Roucken* v. *Erie R.R.*, 174 N.Y.S.2d 427 (1958), plaintiff, a flagman, was injured when a tractor-trailer experienced a brake failure and struck the shanty provided for him by the railroad. Plaintiff there contended that the railroad failed to furnish him with a safe place to work inasmuch as the shanty was constructed too close to the roadway and did not have a window facing easterly to permit him to see oncoming traffic. The court quickly rejected this contention, stating that:

> "In our opinion, neither the location of the shanty nor the absence of a window facing easterly may be said to have constituted negligence proximately contributing to the accident. Furthermore, that the truck going westerly would veer to the left and go off to the south of the roadway was an event too remote to have been reasonably anticipated." 174 N.Y.S.2d at 429.

In the same vein, the plaintiff in *Atlantic Coast Line R. R.* v. *Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952 (1951) was injured while he was climbing over a gondola car in an effort to traverse a crossing blocked by the gondola car. Plaintiff there made no attempt to show that the car was unsafe or defective. Instead plaintiff argued that the railroad should have constructed a bridge or tunnel or scheduled trains so as not to block the crossing. The Fourth Circuit found no merit in plaintiff's argument, remarking that,

> "We do not see how ordinary prudence could have required the construction of a bridge or a tunnel, or the disruption of the railroad's activities suggested by the plaintiff. That remedy would have been all out of proportion to the risk involved." 185 F.2d at 179.

Also controlling on this point is *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138 (1959), where the plaintiff, a flagman, sued the railroad to recover for injuries received when an intoxicated automobile driver ran into him while he was on duty one night flagging traffic for a passing train. Plaintiff's theory in that case was that the crossing layout was inherently unsafe. The Supreme Court, in an opinion written three years after the *Rogers* case, affirmed a judgment for defendant. Mr. Justice Whittaker felt compelled to make some trenchant remarks in a concurring opinion which are peculiarly appropriate to the case at bar.

> "Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a well-lighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a drunken driver. What, I ask, did respondent do or omit that caused or contributed to cause that casualty? How could it have prevented the casualty? Petitioner says that respondent failed to provide him with 'enough protection.' About the only way, as I perceive, that respondent could protect its crossing flagman against injury from such lawless conduct by third persons would be to provide them with military tanks and make sure they stay in them while within or moving about crossing-intersections in the performance of their duties—and I am not even sure that this method, though ironclad, would be certain protection to a flagman against lawless injury by third persons, for someone might shoot him, an act not very different, it seems

> to me, from the drunken driver's conduct which injured petitioner in this case, and for which injuries he insists, and four members of this Court agree, a jury should be permitted to require respondent to pay damages. How this can be thought to square with any known concept of 'negligence' by respondent is beyond me." 361 U.S. at 142.[8]

So in this case, it is impossible to see how the mere furnishing to appellant of motor vehicle rather than rail transportation can be said to square with any known concept of negligence.

V.

CONCLUSION

In conclusion, by no stretch of the imagination can it be said that the railroad custom of transporting hostlers by motor vehicle rather than by rail constitutes negligence under FELA simply because rail transportation may be statistically safer. At least as fanciful is the proposition that the failure to furnish appellant with a driver contributed in whole or in part to appellant's injuries simply because had one been supplied, plaintiff might not have been at the point of impact at the precise time of impact.

Put simply, the appellant's injuries in this case were *entirely* the result of the negligence of the driver of the other vehicle. As the Fourth Circuit has stated,

> "Before a case, under the Federal Employers' Liability Act, may be left to the jury, there must be more than a mere breath of evidence which tends to show negligence on the part of the railroad." *Chesapeake & O. Ry.*, v. *Burton,* 217 F.2d 471, 473 (4th Cir. 1954).

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[8] See also *Emmick* v. *Baltimore & O. R.R.*, 339 Ill. App. 148, 88 N.E.2d 739 (1949), *cert. denied* 340 U.S. 831 (1950).

In the case at bar, there is not even a breath of evidence tending to show negligence on the part of Seaboard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing brief were mailed to Willard J. Moody, Esquire, Moody, McMurran and Miller, 200 Professional Building, Portsmouth, Virginia 23704, counsel for Petitioner, this 1st day of September, 1972.

EPPA HUNTON, IV